

PARK51 AS A CASE STUDY: TESTING THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT

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INTRODUCTION

Few institutions in this world are as universally celebrated and divisive as religion. Imagine that you are the patriarch of a middle class Muslim family living in Lower Manhattan. You were born and raised in New York City and are proud of your Muslim-American heritage. On September 11, 2001, you were devastated to learn that Muslim extremists were responsible for the suicide attacks that caused the World Trade Center's Twin Towers to collapse, ending the lives of so many fellow Americans.

During the twenty-four hours following that fateful day you were struck by the realization that your religion and your country would never be the same. You began to wonder if "Muslim-American" would become an oxymoron. That is, you began to speculate whether the atrocities committed by a few Islamic extremists would serve to "awaken a sleeping giant"¹ and cause America's predominantly Christian population² to support restrictions on the religious tolerances guaranteed by the First Amendment.³ In essence, would your family have to choose between being Muslim and being American?

On December 8, 2009, the *New York Times* published an article that seemed to answer this final looming question with a resounding "no."⁴ The article explained that Imam Feisal Abdul Rauf, a cleric and leader within the Muslim-American community, was collaborating with others to construct an Islamic community center ("Park51") just blocks away from "ground zero."⁵ Imam Feisal Abdul Rauf is heralded "as having built [his] career preaching tolerance and interfaith understanding."⁶ Moreover, the Imam explained that the location's

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1. TORA! TORA! TORA! (20th Century Fox 1970) (quoting the memorable words attributed to Japanese Admiral Isoroku Yamamoto after the Japanese attacked Pearl Harbor on December 7, 1941).

2. BARRY A. KOSMIN & ARIELA KEYSAR, AMERICAN RELIGIOUS IDENTIFICATION SURVEY (ARIS 2008): SUMMARY REPORT 3 tbl. 1 (2009), available at http://www.americanreligionsurvey-aris.org/reports/ARIS_Report_2008.pdf (finding that seventy-six percent of American adults are Christian).

3. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

4. Ralph Blumenthal & Sharaf Mowjood, *Muslim Prayers and Renewal Near Ground Zero*, N.Y. TIMES, Dec. 8, 2009, http://www.nytimes.com/2009/12/09/nyregion/09mosque.html?_r=3&sq=mosque%20ground%20zero&st=nyt&scp=1&pagewanted=all.

5. *Id.*

6. *Id.*

close proximity to the World Trade Center “sends the opposite statement to what happened on 9/11.”⁷ Finally, you think to yourself, a permanent reminder will be built in New York City proclaiming to the world that Islamic extremists did not prevail on September 11, 2001.

However, some families of 9/11 victims and right-wing political organizations oppose the construction of Park51.⁸ One of the opposition’s more poignant arguments is its assertion that “throughout Islam’s history, whenever a region was conquered, one of the first signs of consolidation was/is the erection of a mosque atop the sacred sites of the vanquished”⁹ Assuming arguendo this is historically accurate, unless Imam Feisal Abdul Rauf, collaborators involved in planning the project, or another source provides conclusive evidence that Park51 will be a “victory mosque[],”¹⁰ the opposition’s argument mirrors the Runnymede Trust’s definition of “Islamophobia.”¹¹

What’s more, “[t]he wide dissemination of misrepresentations about Islam and Muslims has given the impression of public credence to many falsities about the project.”¹² According to Deepa Kumar, a professor of media studies at Rutgers University’s School of Communication and Information, “the mainstream media and the political elite have helped generate an attitude toward Muslims that has been largely negative.”¹³ The emotionally charged media surrounding what the opposition has named the “Ground Zero mosque”¹⁴ is exacerbating anti-

7. *Id.*

8. See Cristian Salazar, Associated Press, *Conservative Group Vows Legal Action After NYC Panel Clears Way for Mosque Near Ground Zero*, FOX NEWS (Aug. 4, 2010), <http://www.foxnews.com/us/2010/08/04/conservative-group-vows-legal-action-nyc-panel-clears-way-mosque-near-ground/>.

9. Raymond Ibrahim, *The Two Faces of the Ground Zero Mosque*, MIDDLE E. F. (June 22, 2010), <http://www.meforum.org/2678/ground-zero-mosque>.

10. See Brian Montopoli, *Renee Ellmers Ad: No Muslim “Victory Mosque” at Ground Zero*, CBS NEWS (Sept. 22, 2010, 3:33 PM), http://www.cbsnews.com/8301-503544_162-20017307-503544.html.

11. THE RUNNYMEDE TRUST, ISLAMOPHOBIA: A CHALLENGE FOR US ALL (1997), available at <http://www.runnymedetrust.org/uploads/publications/pdfs/islamophobia.pdf> (outlining eight components created by the Runnymede Trust, a leading race equality think tank, to define “Islamophobia.” In this context, the two components implicated are “enemy” and “manipulative.” The “enemy” component represents those who view Islam “as violent, aggressive, threatening, supportive of terrorism, engaged in ‘a clash of civilisations’ [sic].” The “manipulative” component represents those who view Islam “as a political ideology, used for political or military advantage.”).

12. M. Cherif Bassiouni, *GR White Paper: Islamophobia and the New York Mosque Controversy*, GROVE REP. (Sept. 27, 2010), <http://www.groverreport.org/2010/09/27/islamophobia-and-the-new-york-mosque-controversy/>.

13. Nicole Pride, *Hot Topics: Examining Islamophobia in America*, RUTGERS TODAY (Sept. 22, 2010), <http://news.rutgers.edu/medrel/special-content/fall-2010/hot-topics-whats-beh-20100921>.

14. Jean Marbella, *When a ‘Ground Zero Mosque’ Really is Neither: What a Difference Two Blocks Makes*, BALT. SUN (Aug. 14, 2010), http://articles.baltimoresun.com/2010-08-14/news/bs-md-marbella-ground-zero-mosque-20100814_1_ground-zero-mosque-vesey-street-hallowed-

Muslim sentiments across the nation.¹⁵

The result is the current national debate concerning “Islam’s place in American society.”¹⁶ In Murfreesboro, Tennessee, this debate has entered the courtroom with the case of *Estes v. Rutherford County Regional Planning Commission*.¹⁷ In *Estes*, the plaintiffs opposed the county’s decision to approve site plans for the construction of an Islamic center in Murfreesboro.¹⁸ Although the point of contention in *Estes* is merely a subset of the main issue, it represents the focal point on which the national debate turns: “whether the Islamic [c]enter[s] of Murfreesboro[, New York City, etc. are] entitled to protection under the First Amendment.”¹⁹ Thus, the federal law implicated in *Estes*²⁰ and similar cases is inextricably linked to one of America’s most polarizing issues.

The Religious Land Use and Institutionalized Persons Act (RLUIPA)²¹ is the federal law being invoked in courts across the country to resolve litigation concerning the construction of Islamic community centers.²² In general, the RLUIPA protects religious organizations from zoning restrictions that impose a “substantial burden” on the organization’s “religious exercise.”²³ However, courts have reached different conclusions when applying the RLUIPA’s legal terms.²⁴ Unfortunately, the resulting uncertainty in applying the RLUIPA is

ground.

15. See Laurie Goodstein, *Across Nation, Mosque Projects Meet Opposition*, N.Y. TIMES (Aug. 7, 2010), <http://www.nytimes.com/2010/08/08/us/08mosque.html>.

16. Thomas S. Kidd, *Whether Park 51 or Burning Qurans, Liberty is Not Propriety*, USA TODAY (Sept. 8, 2010), http://www.usatoday.com/news/opinion/forum/2010-09-09-kidd09_ST_N.htm.

17. No. 10CV-1443 (Tenn. Ch. Ct. Rutherford Cnty. filed Sept. 17, 2010).

18. See Associated Press, *Justice Department Wades into Tennessee Mosque Controversy on Side of Islam*, FOX NEWS (Oct. 18, 2010), <http://www.foxnews.com/politics/2010/10/18/justice-department-wades-tennessee-mosque-controversy-islam/>.

19. *Id.*

20. See Brief for United States of Am. as Amicus Curiae, *Estes v. Rutherford Cnty. Reg’l Planning Comm’n*, No. 10CV-1443 (Tenn. Ch. Ct. Rutherford Cnty. filed Oct. 18, 2010).

21. 42 U.S.C. § 2000cc (2006).

22. John Schwartz, *Zoning Law Aside, Mosque Projects Face Battles*, N.Y. TIMES (Sept. 3, 2010), <http://www.nytimes.com/2010/09/04/us/politics/04build.html> (emphasizing the central role of the RLUIPA in resolving legal disputes surrounding Islamic community centers by quoting Daniel Lauber, a past president of the American Planning Association, as saying that “[e]very planner and zoning lawyer I’ve talked to about this is saying the same thing — Rluipa [sic]”).

23. 42 U.S.C. § 2000cc(a)(1).

24. Compare *Henley v. City of Youngstown Bd. of Zoning Appeals*, 735 N.E.2d 433, 439 (Ohio 2000) (allowing a society of Catholic nuns to convert a portion of their convent into apartments for homeless women and noting that “[s]everal courts have specifically permitted residential accommodations in church buildings as accessory uses.”), with *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 347-48 (2d Cir. 2007) (stating that the RLUIPA is implicated in this case because the religious school’s expansion project calls for the construction of classrooms that “will [all] be used at some time for religious education” The court takes

prejudicial to both municipalities and religious organizations because neither group is able to plan future building projects with a reasonable degree of confidence that their position will prevail in court.

This Note discusses the strengths and weaknesses of judicial opinions interpreting the RLUIPA with the goal of creating and advocating for a uniform standard that fuses unique ideas with the strengths of opinions from different jurisdictions. Part I of this Note explains the history of the RLUIPA and discusses the Act's significance and intended purpose. Part II examines the various ways in which courts define "religious exercise" and "substantial burden" to illustrate the different ways RLUIPA is applied across jurisdictions. Part III advocates for a uniform standard that incorporates some of the strengths of opinions from different jurisdictions. Finally, Part IV applies this hybrid standard to the current controversy concerning the Park51 Islamic community center to illustrate how the standard will function.

I. THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT: HISTORICAL PERSPECTIVE, SIGNIFICANCE, AND INTENDED PURPOSE

Both houses of Congress unanimously passed the Religious Land Use and Institutionalized Persons Act.²⁵ Signed into law on September 22, 2000,²⁶ the RLUIPA provides protection of land used as "religious exercise" by giving churches or other religious institutions a way to avoid zoning law restrictions²⁷ that impose a "substantial burden" on their property use:

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

- (A) is in furtherance of a compelling governmental interest; and
- (B) is the least restrictive means of furthering that compelling governmental interest.²⁸

the opportunity to contrast this case with one that would presumably not implicate the RLUIPA: "a case like the building of a headmaster's residence, where religious education will not occur in the proposed expansion.").

25. U.S. DEP'T OF JUSTICE, REPORT ON THE TENTH ANNIVERSARY OF THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT 2 (Sept. 22, 2010), *available at* http://www.justice.gov/crt/rluipa_report_092210.pdf [hereinafter REPORT].

26. *Id.* at 2.

27. 42 U.S.C. § 2000cc(a)(2)(C) (stating that the scope of the "[g]eneral rule" expressed in 42 U.S.C. § 2000cc(a)(1) applies when "the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved").

28. *Id.* § 2000cc(a)(1).

Additionally, the RLUIPA prohibits the government from enacting regulations that discriminate or exclude religious land use within municipalities. Specifically, the “[e]qual terms” provision provides that “[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.”²⁹ Ultimately, the RLUIPA’s two provisions that protect land use constituting “religious exercise” from “[s]ubstantial burdens”³⁰ and “[d]iscrimination and exclusion”³¹ impose “strict scrutiny judicial review of land use conflicts between religious organizations and local authorities.”³²

A. Historical Perspective

The United States Supreme Court has recognized that the “RLUIPA is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens, consistent with [the Supreme] Court’s precedents.”³³ That is, federal legislation aimed at protecting religious exercise by imposing strict scrutiny on government regulations is not a novel concept. The RLUIPA’s predecessor, the Religious Freedom Restoration Act of 1993 (RFRA),³⁴ although providing more “[u]niversal” coverage,³⁵ contained language similar to the RLUIPA.³⁶ However, the RFRA was invalidated by the Supreme Court’s decision in *City of Boerne v. Flores*.³⁷ In *City of Boerne*, the Court found the RFRA to be overly broad, “holding that the [RFRA] exceeded Congress’ remedial powers under the Fourteenth Amendment.”³⁸

The RLUIPA is Congress’ response to the Supreme Court’s decision in *City of Boerne*.³⁹ The RLUIPA is “[l]ess sweeping than RFRA”⁴⁰ because “[t]he

29. *Id.* § 2000cc(b)(1).

30. *Id.* § 2000cc(a).

31. *Id.* § 2000cc(b).

32. Julie M. Osborn, *RLUIPA’s Land Use Provisions: Congress’ Unconstitutional Response to City of Boerne*, 28 ENVIRONS ENVTL. L. & POL’Y J. 155, 156 (2004).

33. *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005).

34. 42 U.S.C. § 2000bb (1994), *invalidated by City of Boerne v. Flores*, 521 U.S. 507 (1997) (declaring the Act unconstitutional).

35. *Cutter*, 544 U.S. at 715.

36. The “RFRA prohibits ‘government’ from ‘substantially burdening’ a person’s exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden ‘(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.’” *City of Boerne v. Flores*, 521 U.S. 507, 515-16 (1997) (quoting former 42 U.S.C. § 2000bb-1A (1994)).

37. *Id.* at 532-36.

38. *Cutter*, 544 U.S. at 715.

39. *Id.* (stating that “Congress . . . responded [to the Supreme Court’s decision in *City of Boerne*], this time by enacting RLUIPA.”).

40. *Id.* (elaborating that “RLUIPA targets two areas . . . [1.] land-use regulation . . . [2.]

drafters of RLUIPA sought . . . to avoid RFRA's fate by limiting the [RLUIPA's] scope"⁴¹ As a result, Congress specifically designed the RLUIPA to be different enough from the RFRA to pass judicial review, something the RFRA was unable to do, yet similar enough to accomplish many of the same goals set forth in the RFRA.⁴²

B. Significance and Intended Purpose

The RLUIPA's legislative history is instructive when considering the federal law's significance and intended purpose.⁴³ The Act is significant because the legislators responsible for its design recognized that:

The right to assemble for worship is at the very core of the free exercise of religion. Churches and synagogues cannot function without a physical space adequate to their needs and consistent with their theological requirements. The right to build, buy, or rent such a space is an indispensable adjunct of the core First Amendment right to assemble for religious purposes.

The hearing record compiled massive evidence that this right is frequently violated. Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation.⁴⁴

Additionally, President Bill Clinton succinctly explained the significance of the RLUIPA in his official remarks upon signing the Act: "Religious liberty is a constitutional value of the highest order, and the Framers of the Constitution included protection for the free exercise of religion in the very first Amendment. This Act recognizes the importance the free exercise of religion plays in our democratic society."⁴⁵

Moreover, although the RLUIPA is more than ten years old, its topical significance cannot be overstated. In its "Report on the Tenth Anniversary of the Religious Land Use and Institutionalized Persons Act," the United States

religious exercise by institutionalized persons").

41. *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 897 (7th Cir. 2005).

42. Osborn, *supra* note 32, at 156.

43. *Cathedral Church of the Intercessor v. Inc. Vill. of Malverne*, 353 F. Supp. 2d 375, 389-90 (E.D.N.Y. 2005) (turning to the RLUIPA's legislative history to evaluate the Plaintiffs' assertion that "the facts of this case are precisely what was contemplated by Congress when it enacted RLUIPA").

44. 146 CONG. REC. S7774 (daily ed. July 27, 2000) (joint statement of Sens. Hatch & Kennedy).

45. REPORT, *supra* note 25, at 2 (quoting Presidential Statement on Signing The Religious Land Use and Institutionalized Persons Act of 2000, 36 WEEKLY COMP. PRES. DOC. 2168 (Sept. 22, 2000)).

Department of Justice emphasized the RLUIPA's continued significance.⁴⁶ The Report stated:

[N]early a decade after the attacks of September 11, 2001, Muslim Americans continue to struggle for acceptance in many communities, and still face discrimination. Of [eighteen] RLUIPA matters involving possible discrimination against Muslims that the Department has monitored since September 11, 2001, eight have been opened since May of 2010.⁴⁷

According to the Report, during the period of approximately nine years between the 9/11 terrorist attacks and the Report's publication, nearly half of all "RLUIPA matters" opened by the Department involving Muslims occurred in the five months prior to the Report's publication.⁴⁸ Hence, during this nine year period, forty-four percent of cases involving Muslims were opened during only five percent of the total time.

It is not merely coincidence that a sudden influx of "RLUIPA matters" involving Muslims began in May 2010. The reason for the influx is understood once one realizes that the Park51 Islamic community center building project was approved on May 5, 2010.⁴⁹ Thus, although not expressly stated in the Report, the Department's rate of cases concerning "RLUIPA matters involving possible discrimination against Muslims"⁵⁰ has increased since the Park51 project was formally approved. Consequently, the RLUIPA is tied to a topical matter of national interest and is the legal tool used to resolve the cases involved.

The RLUIPA's intended purpose is to "ameliorate the effect of local land use regulations and widen the land use rights of religious institutions in land use conflicts."⁵¹ Clearly, the RLUIPA protects religious institutions from the effects of overtly discriminatory land use regulations. However, religious liberty can also be threatened by the effects of land use regulations that more subtly discriminate against religious institutions.⁵² For example, "discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or 'not consistent with the city's land use plan.'"⁵³

In fact, Congress recognized that the individualized assessments involved in

46. *Id.*

47. *Id.* at 12.

48. *Id.*

49. Anne Barnhard & Alan Feuer, *Outraged, and Outrageous*, N.Y. TIMES (Oct. 8, 2010), <http://www.nytimes.com/2010/10/10/nyregion/10geller.html>.

50. REPORT, *supra* note 25, at 12.

51. Heather M. Welch, *The Religious Land Use and Institutionalized Persons Act and Mega-Churches: Demonstrating the Limits of Religious Land Use Exemptions in Federal Legislation*, 39 U. BALT. L. REV. 255, 256 (2010).

52. See REPORT, *supra* note 25, at 3.

53. 146 CONG. REC. S7774 (daily ed. July 27, 2000) (joint statement of Sens. Hatch & Kennedy).

land use regulation foster “covert”⁵⁴ discrimination.⁵⁵ Covert forms of discrimination “make it difficult to prove discrimination in any individual case.”⁵⁶ Acknowledging the difficulties posed by covert discrimination, “Congress chose to cast a wide net in seeking to eradicate this covert discrimination by barring ‘substantial burdens’ on religious activity, rather than just aiming RLUIPA at clearly intentional discrimination.”⁵⁷ That is, the RLUIPA protects against subtle forms of discrimination because “[i]f a land-use decision . . . imposes a substantial burden on religious exercise . . . and the decision maker cannot justify it, the inference arises that hostility to religion, or more likely to a particular sect, influenced the decision.”⁵⁸

Particularly, the RLUIPA widens the land use rights of religious institutions by mandating that courts construe key terms within the statute broadly.⁵⁹ An individual or organization wishing to bring suit under the RLUIPA “must present evidence that the land use regulation at issue as implemented: (1) imposes a substantial burden (2) on the ‘religious exercise’ (3) of a person, institution, or assembly.”⁶⁰ Accordingly, the threshold issue becomes whether the intended land use of the institution bringing suit is a “religious exercise.”⁶¹ Because the number of ways a church can claim protection under the RLUIPA is positively correlated to the breadth with which a court interprets “religious exercise,” it is important to understand the scope of the term.

Whereas “First Amendment jurisprudence has limited ‘religious exercise’ to the actual practice of religious beliefs ‘fundamental’ to the person’s faith, most judicial interpretations of ‘religious exercise’ as used in RLUIPA have given the term a wider meaning.”⁶² Therefore, broadly defining and constructing the key terms within the RLUIPA also provides wider land use rights for religious institutions.

54. Daniel P. Lennington, *Thou Shalt Not Zone: The Overbroad Applications and Troubling Implications of RLUIPA’s Land Use Provisions*, 29 SEATTLE U. L. REV. 805, 817 (2006).

55. 146 CONG. REC. S7775 (daily ed. July 27, 2000).

56. *Id.*

57. Lennington, *supra* note 54, at 817.

58. *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005) (internal citation omitted).

59. *See, e.g., Cathedral Church of the Intercessor v. Inc. Vill. of Malverne*, 353 F. Supp. 2d 375, 390 (E.D.N.Y. 2005) (citing “the broad language in the legislative history of RLUIPA”).

60. *Bikur Cholim, Inc. v. Vill. of Suffern*, 664 F. Supp. 2d 267, 275 (S.D.N.Y. 2009) (citing 42 U.S.C. § 2000cc(a)(1) (2006)).

61. *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 760 (7th Cir. 2003) (“In order to prevail on a claim under the substantial burden provision, a plaintiff must first demonstrate that the regulation at issue actually imposes a substantial burden on religious exercise.”).

62. *Trinity Assembly of God of Balt. City, Inc. v. People’s Counsel for Balt. Cnty.*, 941 A.2d 560, 572 (Md. Ct. Spec. App. 2008) (citing *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 760 (7th Cir. 2003)), *aff’d*, 962 A.2d 404 (Md. 2008).

II. JURISDICTIONAL DIFFERENCES IN DEFINING “SUBSTANTIAL BURDEN” AND “RELIGIOUS EXERCISE”

Determining whether the Islamic community centers facing opposition across the country are entitled to protection under the RLUIPA is difficult because the scope given to key terms such as “substantial burden” and “religious exercise” varies across jurisdictions.⁶³ Although the RLUIPA defines “religious exercise”⁶⁴ and First Amendment jurisprudence interprets “substantial burden,”⁶⁵ variations in the application of these terms has resulted in a split among the circuits. Accordingly, developing a uniform standard for applying the RLUIPA necessitates an understanding of the different interpretations of both “substantial burden” and “religious exercise.”

A. Religious Exercise

Courts have reached different conclusions even when applying the legal terms and standards explicitly defined by the RLUIPA. Particularly, courts in various jurisdictions have differed in the scope they give to the term “religious exercise.” The RLUIPA defines “religious exercise” as “includ[ing] any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”⁶⁶ The RLUIPA clarifies this definition by stating that “[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.”⁶⁷ Clearly, RLUIPA’s definitions of “religious exercise” indicate “Congress’s intent to expand the concept of religious exercise contemplated . . . in . . . First Amendment jurisprudence,”⁶⁸ but the question becomes how far Congress intended to extend the definition.

In *Westchester Day School v. Village of Mamaroneck*,⁶⁹ the Second Circuit recognized Congress’s intent to provide expansive protections for religious organizations when it stated that “[t]o remove any remaining doubt regarding how broadly Congress aimed to define religious exercise, RLUIPA goes on to state that the Act’s aim of protecting religious exercise is to be construed broadly and ‘to the maximum extent permitted by the terms of this chapter and the

63. See generally Shelley Ross Saxer, *Assessing RLUIPA’s Application to Building Codes and Aesthetic Land Use Regulation*, 2 ALB. GOV’T L. REV. 623 (2009) (providing cases illustrating the different ways jurisdictions have applied “religious exercise” and “substantial burden”).

64. 42 U.S.C. § 2000cc-5(7)(A) (2006).

65. See *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006) (“RLUIPA itself does not define ‘substantial burden,’ but the Supreme Court has defined the term in the related context of the Free Exercise Clause.”).

66. 42 U.S.C. § 2000cc-5(7)(A).

67. *Id.* § 2000cc-5(7)(B).

68. *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 760 (7th Cir. 2003) (internal citation omitted).

69. 504 F.3d 338 (2d Cir. 2007).

Constitution.”⁷⁰

In *Westchester*, the court interpreted “religious exercise” as protecting a religious day school’s right to renovate and expand its facilities.⁷¹ Westchester Day School, a Jewish private school, provided a dual curriculum aimed at providing students with an education integrating Judaic and general studies. In 1998, the school determined its facilities were inadequate and the deficiencies had rendered the school unable to meet educational standards required by Orthodox Judaism.⁷² Consequently, the school developed an expansion project that involved renovating existing facilities and constructing a new building.

In 2001, Westchester Day School applied to the zoning board for a modification of its special permit so the expansion project could proceed. Initially, the zoning board voted unanimously in finding the school complied with preliminary requirements allowing consideration of the project to proceed.⁷³ However, the zoning board later rescinded that decision due to mounting public opposition to the school’s expansion project. Consequently, the Westchester Day School invoked the RLUIPA and claimed the zoning board’s decision constituted a substantial burden on the school’s religious exercise.⁷⁴

The court extended RLUIPA protection in *Westchester* because each of the proposed rooms to be built by the school would be used “at least in part for religious education and practice.”⁷⁵ However, the court did not indicate what percentage of total time must be dedicated to religious purposes for an intended use to be “at least in part for religious education and practice.” Rather, the court declined the opportunity to create a bright line rule stating the exact point in which a building project implicates the RLUIPA.⁷⁶

Instead, the Second Circuit stated “[t]hat line exists somewhere between this case, where every classroom being constructed will be used at some time for religious education, and a case like the building of a headmaster’s residence, where religious education will not occur in the proposed expansion.”⁷⁷ Nevertheless, what if the particular religious sect affiliated with the school professes a sincere religious belief that a headmaster should reside where his pupils study the particular religion?⁷⁸ In such a case, an expansion providing living quarters for the headmaster might be necessary to facilitate the sect’s religious practices. Further, the issue becomes whether an expansion adding living quarters for the headmaster would be considered “at least in part for

70. *Id.* at 347 (citing 42 U.S.C. § 2000cc-3(g) (2006)).

71. *Id.* at 347-48.

72. *Id.* at 345.

73. *Id.* at 345-46.

74. *Id.* at 346.

75. *Id.* at 348.

76. *Id.*

77. *Id.*

78. *See Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005) (“Although RLUIPA bars inquiry into whether a particular belief or practice is ‘central’ . . . the Act does not preclude inquiry into the sincerity of [an individual or institution’s] professed religiosity.”) (internal citation omitted).

religious education and practice.”

These questions are also implicated in *Greater Bible Way Temple of Jackson v. City of Jackson*.⁷⁹ In *Greater Bible Way*, the Michigan Supreme Court found the Greater Bible Way Temple had not established that building an apartment complex would constitute “religious exercise.”⁸⁰ The court reached this decision despite the Greater Bible Way Temple’s bishop having signed and submitted an affidavit stating the Temple’s “mission” as follows: “The Greater Bible Way Temple stands for truth, the promotion of the Gospel of Jesus Christ through the Apostolic Doctrine, and an exceptional level of service to the community. This includes *housing*, employment, consulting and supports as determined appropriate in fulfilling our Mission.”⁸¹ Furthermore, the affidavit stated that the Temple “wishes to further the teachings of Jesus Christ by providing housing and living assistance to the citizens of [the city] . . . [and] there is a substantial need in the [city] for clean and affordable housing, especially for the elderly and disabled.”⁸²

Nevertheless, the Michigan Supreme Court found that there was no evidence “that the proposed apartment complex would be used for religious worship or for any other religious activity.”⁸³ Moreover, the court stated that “the building of an apartment complex would be considered a commercial exercise, not a religious exercise.”⁸⁴ Finally, the court concluded that a “commercial exercise” does not become a “religious exercise” merely because a religious institution owns the building.⁸⁵

However, building the apartment complex fulfills a core tenet of the Temple’s religion because it could be used to “further the teachings of Jesus Christ by providing housing and living assistance to the citizens of [the city].”⁸⁶ Therefore, because the Temple considered the construction and maintenance of the apartment complex to be religious exercise, it should “be considered . . . religious exercise of the person or entity that uses or intends to use the property for that purpose.”⁸⁷

Accordingly, it seems that the court’s primary reason for refusing to extend the definition of “religious exercise” to protect the apartment complex rests in the fact that an apartment complex is traditionally a “commercial exercise” and not a “religious exercise.” Thus, although not explicitly stated in the court’s opinion, it appears that an intended religious activity that resembles a traditionally

79. 733 N.W.2d 734, 746 (Mich. 2007).

80. *Id.*

81. *Id.* (emphasis added).

82. *Id.* at 746, 746 n.17.

83. *Id.* at 746.

84. *Id.*; see also *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 663 (10th Cir. 2006) (“[The] jury found that the Church[, which was operating a day care,] failed to prove it was engaged in a *sincere* exercise of religion.”).

85. *Greater Bible Way Temple*, 733 N.W.2d at 746.

86. *Id.*

87. 42 U.S.C. § 2000cc-5(7)(B) (2006).

“commercial exercise”⁸⁸ is less likely to gain protection under RLUIPA because the court may question the sincerity of the activity’s “religiosity.”⁸⁹

The facts in *Greater Bible Way* contrast with the hypothetical scenario posed by the court in *Westchester*. Whereas the court in *Westchester* did not state that proponents of the hypothetical headmaster’s residence offered evidence indicating the school considered such a use “religious exercise,”⁹⁰ the proponents of the apartment complex provided proof via a signed affidavit establishing that part of the Temple’s “mission” included providing housing.⁹¹ So if the Second Circuit’s language in *Westchester*⁹² were applied in this case, would the construction of an apartment complex to fulfill the Temple’s “mission” constitute a use “at least in part for religious . . . practice”?⁹³

Other courts have found that religious organizations that operate concurrently with, or operate as, traditionally commercial activities do not qualify as “religious uses.”⁹⁴ In *Gallagher v. Zoning Board of Adjustment*,⁹⁵ the Young People’s Church of the Air sought a use permit to operate a radio station aimed at advancing the organization’s “interdenominational religious program and activity [by] broadcasting religious services and messages to radio listeners.”⁹⁶ In that case, the court concluded that the radio station would operate as a commercial broadcasting facility during the week by selling broadcasting time to its customers.⁹⁷ Accordingly, the court denied the use permit, declaring that the proposed use was secular because “[o]nly a small number of broadcasting hours would be devoted each Sunday to . . . religious purpose.”⁹⁸

The *Gallagher* court engaged in an evaluation similar to that used by the Second Circuit to determine whether an intended use constituted “religious exercise.” That is, the *Gallagher* court contrasted the portion of time the radio broadcasting station would devote to “religious purpose” with the amount of time

88. *Greater Bible Way Temple*, 733 N.W.2d at 746.

89. *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005); see also Jeffrey F. Ghent, Annotation, *What Constitutes “Church,” “Religious Use,” or the Like Within Zoning Ordinance*, 62 A.L.R. 3d 197 (2009).

90. *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 348 (2d Cir. 2007) (alluding to the fact that the Westchester Religious Institute had requested permission to build a headmaster’s residence in 1986; although that request was not before the court in this decision, the court used it as a hypothetical scenario to illustrate its point).

91. *Greater Bible Way Temple*, 733 N.W.2d at 746.

92. See *Westchester Day Sch.*, 504 F.3d at 348.

93. *Id.*

94. See, e.g., *Scottish Rite Cathedral Ass’n of L.A. v. City of L.A.*, 67 Cal. Rptr. 3d 207, 216-17 (Cal. Ct. App. 2007) (involving a commercial entity without Masonic ties, which operated the Scottish Rite Cathedral by “market[ing] the Cathedral as a venue for all events, commercial events included”).

95. 32 Pa. D. & C.2d 669 (1963).

96. *Id.* at 669-70.

97. *Id.* at 671.

98. *Id.* at 674.

devoted to secular, commercial purposes. In *Gallagher*, a few hours of broadcasting time each week dedicated to “religious purpose” was not sufficient when the remaining time was used for “commercial exercise.” Applying this analysis to the facts in *Westchester*, it is unclear whether the court would have found that the day school’s construction qualified as “religious exercise” if each room in the proposed expansion “would be used at least . . . [a few hours each week] for religious education and practice,”⁹⁹ with the remaining time used for commercial interests. In other words, the question becomes which is the threshold inquiry: what percentage of the intended use will be enough to constitute “religious exercise,” or whether the time not used strictly as “religious exercise” is used for pecuniary gain?

The answer seems to be the latter. One of the best ways to illustrate this concept is to compare the results in *Grace United Methodist Church v. City of Cheyenne*¹⁰⁰ with the results in *Unitarian Universalist Church of Central Nassau v. Shorten*.¹⁰¹ In *Grace*, the church desired to establish a public child daycare center that would accommodate one hundred children and provide “religious education.”¹⁰² In *Grace*, the Tenth Circuit affirmed the jury’s decision to withhold RLUIPA protection because the church’s intended use, the proposed childcare center, did not constitute a “religious exercise.”¹⁰³

In *Unitarian Universalist Church*, the church also sought to provide daycare facilities for children.¹⁰⁴ Unlike the Tenth Circuit’s decision in *Grace*, finding that the proposed childcare center did not qualify as a “religious exercise,”¹⁰⁵ the Supreme Court of New York found that “a review of prior decisions makes evident that operation of a day care center is . . . well within the ambit of religious activity.”¹⁰⁶ Why did the Supreme Court of New York find that the childcare facility in *Unitarian Universalist Church* qualified as a “religious activity,” while the Tenth Circuit did not find the childcare facility in *Grace* constituted “religious exercise?”

Admittedly, attempting to answer this question may prove futile considering a court’s determination of what is and is not a “religious use” is not typically guided by a distinct rule and “each case ultimately rests upon its own facts.”¹⁰⁷ Nevertheless, whereas *Unitarian Universalist Church* was decided using First Amendment jurisprudence, *Grace* was decided using the RLUIPA which contains

99. *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 348 (2d Cir. 2007).

100. 451 F.3d 643 (10th Cir. 2006).

101. 314 N.Y.S.2d 66 (N.Y. App. Div. 1970).

102. *Grace United Methodist Church*, 451 F.3d at 655 (citing *Grace United Methodist Church v. City of Cheyenne*, 235 F. Supp. 2d 1186, 1201 (D. Wyo. 2002)).

103. *Id.* at 669.

104. *Unitarian Universalist Church*, 314 N.Y.S.2d at 68.

105. *Grace United Methodist Church*, 451 F.3d at 669.

106. *Unitarian Universalist Church*, 314 N.Y.S.2d at 71.

107. *McGann v. Inc. Vill. of Old Westbury*, 741 N.Y.S.2d 75, 76 (N.Y. App. Div. 2002) (quoting *Cnty. Synagogue v. Bates*, 136 N.E.2d 488, 493 (N.Y.)), *appeal dismissed*, 779 N.E.2d 188 (N.Y. 1956).

a definition of “religious exercise” that is broader than that of the same term applied in First Amendment jurisprudence.¹⁰⁸ So what factual difference between the two cases might explain why a court following a broader definition did not extend protection by defining an intended purpose “religious exercise,”¹⁰⁹ while a similar intended purpose was protected as “religious activity” by a court applying a less expansive definition?¹¹⁰

This apparent anomaly might be explained by the fact “that the proposed daycare [facility in *Grace*] would charge a fee for its services commensurate with fees charged by other daycare facilities in [the same city].”¹¹¹ On the other hand, the proposed child daycare center in *Unitarian Universalist Church* was to be operated as a “not-for-profit corporation.”¹¹² In this case, it is possible that the discrepancy can be explained by reasoning that operating a child daycare facility, an otherwise “[r]eligious use,”¹¹³ transformed into a “commercial exercise”¹¹⁴ because the facility would be used for a distinctly pecuniary purpose, which is a hallmark of “commercial exercise.”

The different outcomes in *Grace* and *Unitarian Universalist Church* are consistent with the legislative history providing congressional intent for the RLUIPA. Congress recognized that:

In many cases, real property is used by religious institutions for purposes that are comparable to those carried out by other institutions. While recognizing that these activities or facilities may be owned, sponsored or operated by a religious institution, or may permit a religious institution to obtain additional funds to further its religious activities, this alone does not automatically bring these activities or facilities within the bill's definition or [sic] “religious exercise.”¹¹⁵

Moreover, RLUIPA does not “extend[] its protection even to those non-religious activities necessary to financially support the [religious organization’s] continued operation.”¹¹⁶

The legislative history provides an excellent example regarding the limit to which the term “religious exercise” extends to provide protection for an organization with religious purposes:

108. See *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 760 (7th Cir. 2003).

109. See *Grace United Methodist Church*, 451 F.3d at 669.

110. See *Unitarian Universalist Church*, 314 N.Y.S.2d at 71.

111. *Grace United Methodist Church*, 451 F.3d at 648.

112. *Unitarian Universalist Church*, 314 N.Y.S.2d at 70.

113. *Id.* at 71.

114. See *Greater Bible Way Temple of Jackson v. City of Jackson*, 733 N.W.2d 734, 746 (Mich. 2007).

115. 146 CONG. REC. S7776 (daily ed. July 27, 2000) (joint statement of Sens. Hatch & Kennedy).

116. *Scottish Rite Cathedral Ass’n of L.A. v. City of L.A.*, 67 Cal. Rptr. 3d 207, 215-16 (Cal. Ct. App. 2007).

[I]f a commercial enterprise builds a chapel in one wing of the building, the chapel is protected if the owner is sincere about its religious purposes, but the commercial enterprise is not protected. Similarly, if religious services are conducted once a week in a building otherwise devoted to secular commerce, the religious services may be protected but the secular commerce is not.¹¹⁷

However, several courts have recognized that the way congregants and communities view their places of worship has evolved over the last half-century. Specifically, “the concept of what constitutes a church has [changed] from a place of worship alone, used once or twice a week, to a church used during the entire week, nights as well as days, for various parochial and community functions.”¹¹⁸ This evolution has expanded the way courts define “religious uses and activities”:

A church is more than merely an edifice affording people the opportunity to worship God. Strictly religious uses and activities are more than prayer and sacrifice and all churches recognize that the area of their responsibility is broader than leading the congregation in prayer. Churches have always developed social groups for adults and youth where the fellowship of the congregation is strengthened with the result that the parent church is strengthened.¹¹⁹

In fact, the courts embracing this more expansive view recognize that limiting “religious uses and activities” to strictly prayer and other more traditional forms of worship “would, in a large degree . . . depriv[e] the church of the opportunity of enlarging, perpetuating and strengthening itself and the congregation.”¹²⁰

Accordingly, “[n]ontraditional religious uses of a building have been considered religious exercise under [this] more expansive view of RLUIPA protection.”¹²¹ Many of the “religious uses” in this category are aimed at providing benefits to the community or social programming for congregants of the church.¹²² In many ways the churches in this “nontraditional” category are similar to the “commercial exercise” churches in *Grace* and *Bible Way* because both the “nontraditional” and “commercial exercise” churches use their facilities

117. 146 CONG. REC. E1563-01 (daily ed. Sept. 21, 2000) (statement of Hon. Canady).

118. *Unitarian Universalist Church*, 314 N.Y.S.2d at 71 (allowing a church to operate a daycare center on its premises). *But see* *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 664 (10th Cir. 2006) (denying church permission to operate a daycare facility).

119. *Cnty. Synagogue v. Bates*, 136 N.E.2d 488, 493 (N.Y. 1956) (allowing a synagogue to establish a twenty-four acre tract of land containing youth activities as well as social groups for both men and women).

120. *Solid Rock Ministries Int’l v. Bd. of Zoning Appeals of Monroe*, 740 N.E.2d 320, 325 (Ohio Ct. App.) (quoting *Cnty. Synagogue*, 136 N.E.2d at 493), *dismissed*, 736 N.E.2d 901 (Ohio 2000).

121. Saxer, *supra* note 63, at 636.

122. *Id.* at 635-38.

to “offer services beyond traditional worship services.”¹²³ Furthermore, both “nontraditional” and “commercial exercise” churches may generate funds by offering these “services beyond traditional worship services.”¹²⁴ Nevertheless, unlike the churches in *Grace and Bible Way*, the churches in the “nontraditional” category provide their services for non-pecuniary reasons. This important distinction allows “nontraditional” churches to avoid the “commercial exercise” label and increases the likelihood that a court will extend RLUIPA protections by defining their services as “religious exercise.”

For instance, in *Episcopal Student Foundation v. City of Ann Arbor*,¹²⁵ the United States District Court for the Eastern District of Michigan interpreted “religious exercise” as including a “socializing hall”¹²⁶ used by a religiously affiliated group on the University of Michigan’s campus.¹²⁷ In *Episcopal*, a non-profit corporation affiliated with the Episcopal Church sought to demolish its current building to make way for a “large and multi-faceted church”¹²⁸ designed to facilitate the organization’s growing membership and “unconventional approach to religion.”¹²⁹ The church’s unconventional approach to religious worship includes hosting social events such as a weekly “Jazz Mass,”¹³⁰ “an alternative spring break, and a Saturday night concert series.”¹³¹ Accordingly, the court found that the services offered by the church went “beyond traditional worship services.”¹³²

In *Episcopal*, the court provided a transparent and methodical approach for evaluating whether a non-profit, religiously affiliated organization’s non-traditional worship services constitute “religious exercise” under RLUIPA. First, the court considered the church’s stated religious mission and beliefs.¹³³ The “[church] claim[ed] its religious mission and beliefs include[d]: ‘providing a spiritual community for its members, creating a progressive and creative worship experience for its members, offering meditation, prayer and study groups for its members, and continually working to welcome new members into the congregation.’”¹³⁴ The court also found that “[c]ommunity outreach and regular worship as a whole are also ‘central to [the church’s] faith and its emphasis on

123. *Episcopal Student Found. v. City of Ann Arbor*, 341 F. Supp. 2d 691, 701 (E.D. Mich. 2004).

124. *Id.*

125. *Id.*

126. *Trinity Assembly of God of Balt., Inc. v. People’s Counsel for Balt. Cnty.*, 941 A.2d 560, 572 (Md. Ct. Spec. App.), *aff’d*, 962 A.2d 404 (Md. 2008).

127. *Episcopal Student Found.*, 341 F. Supp. 2d at 700-01.

128. *Id.* at 694.

129. *Id.* at 693.

130. *Id.*

131. *Id.*

132. *Id.* at 701.

133. *Id.* at 700.

134. *Id.* (internal citation omitted).

spiritual community.”¹³⁵

Next, the court determined whether the church’s non-traditional worship activities fit within a broad category of activities typically offered by religious organizations to supplement traditional worship services.¹³⁶ For example, this court established that “churches regularly hold fundraisers . . . to support the church’s religious endeavors.”¹³⁷ Furthermore, it found that the church’s concert series fit under this broad category of “fundraisers.”¹³⁸

At this stage in the evaluation, the court asserted that “*many religions* offer services beyond traditional worship services as part of their religious offerings.”¹³⁹ Therefore, the court made the distinction between religions that “offer services beyond traditional worship services as part of their religious offerings” and other religions that do not.¹⁴⁰ Although the court did not examine this topic further in *Episcopal*, the subtle distinction illustrates the court’s delicate task in evaluating whether a claimant’s activities constitute “religious exercise” under RLUIPA.

Finally, the *Episcopal* court determined whether the particular, non-traditional activity had a “religious purpose” by evaluating whether the benefits achieved by engaging in the activity support the religious organization’s stated mission and beliefs.¹⁴¹ In this case, the court found that:

[E]ven [the church’s] concert series has a religious purpose, in that it (a) enables the church to collect financial contributions to further the church’s mission, and (b) provides members with an opportunity to meet and educate non-members in the community about [the church’s] religion. In turn, such events enable [the church] to seek growth in its local community.¹⁴²

Thus, the court concluded that the church’s “activities constitute[d] ‘religious exercises,’ as defined by the RLUIPA.”¹⁴³ As a result, “the religious exercises identified by [the church] qualif[ied] for RLUIPA’s protections.”¹⁴⁴

However, establishing that a religious institution’s intended land use constitutes “religious exercise,” as defined by RLUIPA, merely satisfies the threshold issue. Next, the court must determine whether the land use regulation at issue imposes a “substantial burden” on the RLUIPA-protected “religious exercise.”

135. *Id.* (internal citation omitted).

136. *Id.* at 701.

137. *Id.*

138. *Id.*

139. *Id.* (emphasis added).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 700.

144. *Id.*

B. Substantial Burden

Whereas the RLUIPA defines “religious exercise,”¹⁴⁵ the “RLUIPA purposely does not define ‘substantial burden.’”¹⁴⁶ Instead, the statute’s legislative history indicates that the term “is to be interpreted by reference to RFRA and First Amendment jurisprudence.”¹⁴⁷ Accordingly, the Supreme Court addressed whether a substantial burden has been placed on an *individual’s* religious exercise and found that “a substantial burden on religious exercise exists when an individual is required to ‘choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other hand.’”¹⁴⁸

However, the Supreme Court’s analysis and application of the term “substantial burden” to an individual’s “religious exercise” is not appropriate for evaluating and applying that same term in the context of religious land use.¹⁴⁹ Therefore, “when there has been a denial of a religious institution’s building application, courts appropriately speak of government action that directly *coerces* the religious institution to change its behavior, rather than government action that forces the religious entity to choose between religious precepts and government benefits.”¹⁵⁰

This synthesis of the Supreme Court’s language and the Second Circuit’s logic leaves plenty of room for courts in various jurisdictions to differ as to how direct a government’s action must be in relation to the allegedly coercive impact or effect that causes a religious institution to change its behavior. Accordingly, courts have reached different conclusions when determining whether a land use regulation creates a “substantial burden.” This fact has been recognized by legal commentators who find that “[a]lthough several federal circuits have defined ‘substantial burden’ in a similar vein, there is not yet an agreed upon national standard by which to judge a RLUIPA violation.”¹⁵¹

145. See 42 U.S.C. § 2000cc-5(7)(A) (2006).

146. *Fortress Bible Church v. Feiner*, 734 F. Supp. 2d 409, 501 (S.D.N.Y. 2010).

147. *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 760 (7th Cir. 2003) (citing 146 CONG. REC. S7776 (daily ed. July 27, 2000) (joint statement of Sens. Hatch & Kennedy) (“The term ‘substantial burden’ as used in this Act is not intended to be given any broader interpretation than the Supreme Court’s articulation of the concept of substantial burden or religious exercise.”)).

148. *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 348 (2d Cir. 2007) (citing *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)).

149. *Id.* at 348-49 (stating that “in the context of land use, a religious institution is not ordinarily faced with the same dilemma of choosing between religious precepts and government benefits. When a municipality denies a religious institution the right to expand its facilities, it is more difficult to speak of substantial pressure to change religious behavior, because in light of the denial the renovation simply cannot proceed”).

150. *Id.* at 349; see, e.g., *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004).

151. Saxer, *supra* note 63, at 638.

The resulting split has produced opinions in several circuits that appear “strict” when compared to those developed in other jurisdictions.¹⁵² The “strictness” of an opinion refers to the degree of difficulty placed on churches to prove that a “substantial burden” has been imposed on their “religious exercise.”¹⁵³ In turn, the degree of difficulty stems from the degree of directness that the claimant is required to show when “proving” that the government’s action “coerce[d] the religious institution to change its behavior.”¹⁵⁴ Thus, for illustrative purposes, the rules developed in different circuits to define the term “substantial burden” can be placed on a continuum from “strictest” to “least strict.” The strictest rule on the continuum is the rule applied in the Seventh Circuit.¹⁵⁵ On the opposite end of the continuum, the Second Circuit’s rule is the most relaxed.¹⁵⁶

In *Westchester*, the Second Circuit adopted the most relaxed standard in holding that “[t]here must exist a close nexus between the coerced or impeded conduct and the institution’s religious exercise for such conduct to be a substantial burden on that religious exercise.”¹⁵⁷ The Second Circuit’s standard makes it easier for a church to prove that a “substantial burden” has been placed on the “religious exercise” of an organization. The Fourth Circuit has developed a standard similar to that used in the Second Circuit.¹⁵⁸ In *Lovelace v. Lee*,¹⁵⁹ the Fourth Circuit defined “substantial burden” as “put[ting] substantial pressure on an adherent to modify his behavior and to violate his beliefs.”¹⁶⁰ The standards developed in the Second and Fourth Circuits are similar because the language used in both of these rules imposes a much less onerous burden of proof on churches to show that the land use regulation is a “substantial burden” on their “religious exercise.”

The Ninth Circuit has taken a middle of the road position by stating that “[f]or a land use regulation to impose a ‘substantial burden,’ it must be ‘oppressive’ to a ‘significantly great’ extent. That is, a ‘substantial burden’ on ‘religious exercise’ must impose a significantly great restriction or onus upon such exercise.”¹⁶¹

The next strictest standard is in the Eleventh Circuit where, in *Midrash*

152. See generally *id.* at 638-39.

153. *Id.* at 638-41.

154. *Westchester Day Sch.*, 504 F.3d at 349 (emphasis omitted).

155. See *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 760 (7th Cir. 2003).

156. See *Westchester Day Sch.*, 504 F.3d at 349.

157. *Id.* at 349.

158. See Saxer, *supra* note 63, at 638-39.

159. 472 F.3d 174 (4th Cir. 2006).

160. *Id.* at 187 (quoting *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 718 (1981)).

161. *Guru Nanak Sikh Soc’y of Yuba City v. Cnty. of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006) (quoting *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004)).

Sephardi, Inc. v. Town of Surfside,¹⁶² the court developed a rule that “requires a more coercive type of government action.”¹⁶³ The Eleventh Circuit characterizes “substantial burden” as a burden that “place[s] more than an inconvenience on religious exercise” and is “akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly.”¹⁶⁴

In *Civil Liberties for Urban Believers v. City of Chicago*,¹⁶⁵ the Seventh Circuit developed and applied the strictest rule in holding that “a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally-effectively impracticable.”¹⁶⁶ Therefore, a land use regulation in the Seventh Circuit will not be defined as a “substantial burden” unless it causes a particular “religious exercise” to be “effectively impracticable.”¹⁶⁷ Accordingly, the Seventh Circuit’s standard is very strict because the rule makes it difficult for churches to prove that a “substantial burden” has been placed on their “religious exercise.”

Determining whether the Islamic community centers facing opposition across the country are entitled to protection under the RLUIPA is difficult because the scope given to key terms such as “substantial burden” and “religious exercise” varies across the jurisdictions. Nevertheless, studying the reasoning behind the seemingly inconsistent holdings in different jurisdictions reveals underlying themes and patterns that lend themselves to organization. Armed with a concrete understanding of the different interpretations attributed to key RLUIPA terms such as “religious exercise” and “substantial burden,” it is possible to develop a uniform standard for applying the RLUIPA.

III. RECOMMENDED UNIFORM STANDARD FOR APPLYING THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT

The circuit courts should adopt a uniform standard for evaluating alleged violations brought under the RLUIPA. This standard would build on the strengths of opinions from the different jurisdictions that have analyzed and applied the RLUIPA in litigation involving “[p]rotection of land use as religious exercise.”¹⁶⁸ Specifically, the standard would provide the necessary framework for courts to evaluate claims under the “[s]ubstantial burdens” provision of the RLUIPA.¹⁶⁹ By adopting a uniform standard, courts would streamline RLUIPA litigation and create a more transparent system upon which municipalities and

162. 366 F.3d 1214 (11th Cir. 2004).

163. Saxer, *supra* note 63, at 639.

164. *Midrash Sephardi, Inc.*, 366 F.3d at 1227.

165. 342 F.3d 752 (7th Cir. 2003).

166. *Id.* at 761.

167. *Id.*

168. 42 U.S.C. § 2000cc (2006).

169. *Id.* § 2000cc(a).

religious organizations could rely when considering future land usage.

The streamlined litigation would lower the “costs that religious groups have [traditionally] incurred as a result of RLUIPA.”¹⁷⁰ The adoption of a uniform standard is necessary given the increasing significance of the Act¹⁷¹ and the fact that the current form of the “RLUIPA has not merely failed to alleviate the purported burdens on religious land users but has actually saddled religious entities with greater burdens incurred in the pursuit of costly court cases and in the waging of protracted battles with neighbors and community officials.”¹⁷²

The uniform standard would function by weighing a religious institution’s purported “religious exercise” to determine which circuit’s standard to impose. The standard used to determine which circuit’s “substantial burden” rule to apply would be driven by how necessary the intended land use is to the institution’s religious exercise. Essentially, the uniform standard mirrors a constitutional equal protection challenge in that “the level of judicial scrutiny varies with the type of classification utilized and the nature of the right affected.”¹⁷³

However, there is an important difference between analysis under the proposed RLUIPA uniform standard and constitutional equal protection claims. Although both employ the same basic concept of using a sliding scale of scrutiny levels to evaluate claims depending on the classification of a particular claim, the relation of the level of scrutiny to the intended religious land use is inverted when compared to the same relationship in a constitutional equal protection case. For example, a court evaluating a claim under equal protection “begins by weighing the importance of the interests affected, and as the right asserted becomes more fundamental, the challenged law is subjected to more rigorous scrutiny at a more elevated position on the sliding scale.”¹⁷⁴ Conversely, under the proposed RLUIPA uniform standard, as the purported “religious exercise” becomes more “traditional,” in regards to the claimants religious beliefs, the challenged law is subjected to the more relaxed rules on the “less strict” portion of RLUIPA uniform standard’s continuum.

Accordingly, churches must prove increasing levels of directness regarding the impact of a challenged law when the purported “religious exercise” resembles “commercial exercise”¹⁷⁵ or accessory uses that are not auxiliary to the church’s

170. Bram Alden, Comment, *Reconsidering RLUIPA: Do Religious Land Use Protections Really Benefit Religious Land Users?*, 57 UCLAL. REV. 1779, 1783 (2010) (finding that RLUIPA has burdened religious organizations with three types of costs: “(1) litigation costs, (2) reliance costs, and (3) reputational costs”).

171. See REPORT, *supra* note 25.

172. Alden, *supra* note 170.

173. 16B AM. JUR. 2D *Constitutional Law* § 857 (2011) (citing *State v. Wamala*, 972 A.2d 1071, 1079 (N.H. 2009), *habeas corpus denied sub nom.* *Wamala v. Blaisdell*, No. 10-CV-87-SM, 2011 WL 285692 (D.N.H. Jan. 28, 2011)).

174. *Id.* (citing *Lot 04B & 5C, Block 83 Townsite v. Fairbanks N. Star Borough*, 208 P.3d 188, 192 (Alaska 2009)).

175. *Greater Bible Way Temple of Jackson v. City of Jackson*, 733 N.W.2d 734, 746 (Mich. 2007).

“traditional” core beliefs.¹⁷⁶ If the church is unable to prove the necessary level of directness, then the challenged land use regulation will not constitute a “substantial burden” under the proposed RLUIPA uniform standard analysis.

On the other hand, the requisite level of directness between the challenged law and the claimant’s purported “religious exercise,” necessary to substantiate a “substantial burden” claim, would decrease as the claimant’s alleged “religious exercise” increasingly resembles “traditional” tenets of a given religion.

Accessory uses are those that are “customarily incidental and subordinate to the principal use of a building or property, and which are dependent on, or pertain to, the principal permitted use.”¹⁷⁷ Courts have not developed bright line rules for determining whether accessory uses should gain RLUIPA protection once the principal use is adjudged to be a “religious exercise.”¹⁷⁸ For purposes of illustrating the functionality of the proposed uniform standard, any truly “accessory uses” will be evaluated in the same manner as principal uses under the methodical approach developed in *Episcopal Student Foundation v. City of Ann Arbor*.¹⁷⁹

Under the RLUIPA’s uniform standard analysis, the more relaxed rules expressed in the Second Circuit¹⁸⁰ and the Fourth Circuit¹⁸¹ would be applied to land uses and accessory uses that are “traditional” tenets¹⁸² to a given religion. Alternatively, courts would apply the more strict rules expressed in the Seventh Circuit¹⁸³ and the Eleventh Circuit¹⁸⁴ when the “religious exercise” represents

176. See generally Saxer, *supra* note 63, at 638–41.

177. Shelley Ross Saxer, *Faith in Action: Religious Accessory Uses and Land Use Regulation*, 2008 UTAH L. REV. 593, 615 (2008) (citation omitted).

178. See *id.* at 615–16.

179. 341 F. Supp. 2d 691, 700–01 (E.D. Mich. 2004).

180. See *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 349 (2d Cir. 2007) (finding that “[t]here must exist a close nexus between the coerced or impeded conduct and the institution’s religious exercise for such conduct to be a substantial burden”).

181. See *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006) (holding that a “‘substantial burden’ is one that ‘put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs’” (internal citation omitted)).

182. Under the RLUIPA, it is inappropriate to inquire as to whether a claimant’s purported “religious exercise” is “central” to a religious institution’s religion. See 42 U.S.C. § 2000cc-5(7)(A) (2006). Nevertheless, RLUIPA does not “bar inquiry into whether a particular belief or practice constitutes an aspect, central or otherwise, of a [religious institution’s] religion.” *Greater Bible Way Temple of Jackson v. City of Jackson*, 733 N.W.2d 734, 745 (Mich. 2007).

183. See *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 761 (7th Cir. 2003) (holding “a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable”).

184. See *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (holding that “a ‘substantial burden’ must place more than an inconvenience on religious exercise; a ‘substantial burden’ is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that

“less traditional” land uses such as “commercial exercise”¹⁸⁵ or accessory uses that are not auxiliary to the church’s core beliefs.

RLUIPA’s uniform standard is premised on the realization that, theoretically, there are an infinite number of religions and an equally infinite number of ways to practice any given religion. And although “not every activity carried out by a religious entity or individual constitutes ‘religious exercise,’”¹⁸⁶ the RLUIPA’s broad definition of “religious exercise”¹⁸⁷ allows for the assumption that every religious entity has certain values or beliefs that must be expressed or symbolized through land use.

Thus, resolving the question of whether an intended land use constitutes a “religious exercise” is heavily dependent on the facts. However, this is an acceptable reality given that courts of law are designed to sift through facts in pursuit of truth. Ultimately, the decision as to whether a land use regulation “substantially burdens” an alleged “religious exercise” should depend on the facts of a given case, not on the rule adopted or developed in a given circuit. The rule should be as fluid as the concept it is designed to analyze.

This point is supported by the fact that sects representing various religions practicing within the United States are geographically located without respect to what federal circuit they inhabit. That is, when a given church was founded, it probably did not choose its location based on the federal circuit presiding over the particular geographic area. Moreover, given the likelihood that some religious sects span many, if not all, of the federal circuits, it seems logical to adopt a uniform standard to ensure that sects are treated consistently regardless of which circuit they are located.¹⁸⁸

IV. APPLICATION OF THE UNIFORM STANDARD TO THE PARK51 ISLAMIC COMMUNITY CENTER IN NEW YORK CITY

Based on the designs for the proposed Islamic community center in New York City, it is unclear whether Park51 would prevail in a suit claiming a violation of RLUIPA under the uniform standard. Nevertheless, the outcome,

tends to force adherents to forego religious precepts or from pressure that mandates religious conduct.”).

185. *Greater Bible Way Temple*, 733 N.W.2d at 746.

186. 146 CONG. REC. S7776 (daily ed. July 27, 2000) (joint statement of Sens. Hatch & Kennedy).

187. *Rocky Mountain Christian Church v. Bd. of Cnty. Comm’rs of Boulder Cnty.*, 612 F. Supp. 2d 1163, 1171-72 (D. Colo. 2009) (RLUIPA’s “definition is broader than the definition of ‘religious exercise’ used under the RFRA and in constitutional jurisprudence under the First Amendment”), *aff’d*, 613 F.3d 1229 (10th Cir. 2010).

188. See, e.g., *Business Services: Uniform Commercial Code*, CYBER DRIVE ILLINOIS, http://www.cyberdriveillinois.com/departments/business_services/uniform_commercial_code/home.html (last visited July 5, 2011) (“UCC requires that the administration of the UCC be conducted in a manner that promotes both local & multi-jurisdictional commerce by striving for uniformity in policies and procedures among the various states.”).

however anticlimactic it may be, is less important than the methodology involved in applying RLUIPA's uniform standard to the unique facts in the hypothetical case involving Park51.

Suppose that the New York City Department of City Planning¹⁸⁹ rejects Park51's application for a building permit after deliberations pursuant to a land use ordinance that permits the Department to perform an "individualized assessment[] of the proposed uses for the property involved."¹⁹⁰ The individualized assessment performed by the New York City Department of City Planning fulfills the jurisdictional prerequisite necessary to begin evaluating the case under a RLUIPA "substantial burden" claim.

Analyzing Park51's claim under the RLUIPA's uniform standard involves a three-step process. First, the court must evaluate the "religiosity"¹⁹¹ of Park51's purported "religious exercise" by following the procedure outlined in *Episcopal*.¹⁹² Next, the court must determine, based upon the level of "religiosity" found in part one, which available rule on the continuum of rules ranging from "strictest" to "least strict" would be appropriate for analyzing the current case. Finally, the court must apply the appropriate standard to determine whether New York's land use regulation imposes a "substantial burden" on Park51's "religious exercise."

A. Determine the "Religiosity" of the Claimant's "Religious Exercise"

Accordingly, the RLUIPA uniform standard evaluation begins by determining the "religiosity" of Park51's purported "religious exercise" as outlined in *Episcopal*. First, the court must consider the church's stated religious mission and beliefs.¹⁹³ Park51's vision statement provides this component of the analysis:

Park51 will be a vibrant and inclusive community center, reflecting the diverse spectrum of cultures and traditions, serving New York City with programs in education, arts, culture and recreation. Inspired by Islamic values and Muslim heritage, Park51 will weave the Muslim-American identity into the multicultural fabric of the United States.¹⁹⁴

189. See generally *New York City Department of City Planning*, NYC.GOV, <http://www.nyc.gov/html/dcp/home.html> (last visited Jan. 18, 2011) (providing general information regarding the New York City Department of City Planning).

190. 42 U.S.C. § 2000cc(a)(2)(C) (2006).

191. See *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005).

192. *Episcopal Student Found. v. City of Ann Arbor*, 341 F. Supp. 2d 691, 700-01 (E.D. Mich. 2004).

193. See *id.* at 700.

194. *Vision*, PARK51 COMMUNITY CENTER, <http://blog.park51.org/vision/> (last visited Aug. 24, 2011).

B. Determine Whether the Non-Traditional Activity Can Be Categorized

Next, the court must determine whether the church's non-traditional worship activities fit within a broad category of activities typically offered by religious organizations to supplement traditional worship services.¹⁹⁵ In this case, the non-traditional activities can be categorized by the facilities that house them. Such facilities include "recreation spaces and fitness facilities (swimming pool, gym, basketball court)[,] an auditorium[,], a restaurant and culinary school[,], cultural amenities including exhibitions[,], education programs[,], a library, reading room and art studios[,], childcare services[,], and] a September 11th memorial and quiet contemplation space, open to all."¹⁹⁶ It is at this stage in Park51's analysis that a court would need expert testimony from both of the opposing sides to determine what broad categories of activities are typically offered in Islamic community centers. Without this vital knowledge it is difficult to determine whether the non-traditional activities provided in Park51's facilities would satisfy this portion of the analysis.

Nevertheless, the broad categories needed to complete this portion of the analysis may be gleaned from a Muslim's description of a mosque¹⁹⁷ and the activities one might expect therein:

A mosque, totally unlike a church or a synagogue, serves the function of orchestrating and mandating every aspect of "life" in a Muslim community from the religious, to the political, to the economic, to the social, to the military. In Islam, religion and life are not separate . . . there is no concept of a personal relationship between the person and the entity being worshiped, so "worship" itself, is of a different nature than that performed in a church or synagogue. So we see that a mosque is a seat of government. A mosque is a school. A mosque is a court. A mosque is a training center. A mosque is a gathering place, or social center. It is not just a place of "worship" per se as understood and as practiced in Western societies.¹⁹⁸

Therefore, "training center"¹⁹⁹ might be the title of a broad category of activities typically offered in an Islamic community center. Accordingly, "recreation spaces and fitness facilities"²⁰⁰ such as basketball courts would fit under "training

195. See *Episcopal Student Found.*, 341 F. Supp. 2d at 701.

196. *Facilities*, PARK51 COMMUNITY CENTER, <http://blog.park51.org/facilities/> (last visited Jan. 18, 2011).

197. See, e.g., Marbella, *supra* note 14 (noting that many supporters of the project and those managing the project itself do not refer to Park51 as a "mosque"; rather, the correct terminology is "community center").

198. Jerry Gordon, *Mega-Mosque Conflicts in America*, NEW ENG. REV., Aug. 2010, available at http://www.newenglishreview.org/custpage.cfm?frm/68924/sec_id/68924 (interviewing Sam Solomon, "former Muslim and Sharia jurist").

199. *Id.*

200. *Facilities*, *supra* note 196.

center” because basketball courts provide a center for athletic training.

*C. Determine Whether the Non-Traditional Activity Promotes
a Religious Purpose*

Finally, the court must determine whether the particular, non-traditional activity has a “religious purpose” by evaluating whether the benefits achieved by engaging in the activity support the religious organization’s stated mission and beliefs.²⁰¹ In this case, the court would likely find that offering “recreation spaces and fitness facilities” provides locations for Lower Manhattan community members to participate in recreational programs and social opportunities.²⁰² As a result, “the religious exercises identified by [the Islamic community center are likely to] qualify for RLUIPA’s protections.”²⁰³

However, upon considering Second Circuit opinions, even though analysis under part one resulted in RLUIPA protection, basketball courts may be judged to have a lower level of “religiosity” than a facility designed for multi-purpose recreational usage. This is particularly true in the Second Circuit. In *Westchester*, the Second Circuit stated that “if a religious school wishes to build a gymnasium to be used exclusively for sporting activities, that kind of expansion would not constitute religious exercise.”²⁰⁴

Accordingly, the court would likely apply the Eleventh Circuit’s rule to evaluate Park51’s intended land use to build basketball courts. The Eleventh Circuit characterizes “substantial burden” as a burden that “place[s] more than an inconvenience on religious exercise” and is “akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly.”²⁰⁵

Upon application of the Eleventh Circuit’s rule, the court would likely find that New York’s land use regulation does not impose a “substantial burden” on Park51’s “religious exercise” in this particular instance. In this case, the court would likely find that denying Park51’s building permit to construct a basketball court does not amount to “more than an inconvenience on religious exercise.”²⁰⁶ The court would likely allow Park51 to construct a multi-purpose recreational facility that could include basketball goals. Therefore, the court’s decision is not coercive because Park51 is not forced to conform or change its plan.²⁰⁷ That is, the facility can still accommodate basketball, but the multi-purpose recreational area will also be used for activities other than sporting events.

201. See *Episcopal Student Found. v. City of Ann Arbor*, 341 F. Supp. 2d 691, 701 (E.D. Mich. 2004).

202. See *Facilities*, *supra* note 196.

203. *Episcopal Student Found.*, 341 F. Supp. 2d at 700.

204. *Westchester Day Sch. v. Vill. of Mamaroneck* 504 F.3d 338, 347 (2d Cir. 2007).

205. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004).

206. *Id.*

207. See *id.*